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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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CAUSE NO. _____

FILED
COURT OF CRIMINAL APPEALS
2/20/2020
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IN THE

COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS,
Petitioner

vs.

ROBERT ERIC WADE, III,
Respondent

On Petition for Discretion Review
From the Third Court of Appeals
Court of Appeals Cause Number 03-18-00712-CR

STATE'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT REQUESTED

NAMES OF ALL PARTIES TO TRIAL COURT'S JUDGMENT

- The Parties to the trial court's judgment are the State of Texas and Respondent, Robert Eric Wade, III.

- The case was tried before the Honorable Suzanne Brooks, Presiding Judge, 26th Judicial District Court, Williamson County, Texas

- Counsel for Respondent at trial was Lisa Hoing, 3008 Dawn Drive, Suite 106, Georgetown, Texas 78628, and Millie Thompson, 1411 West Avenue, Suite 100, Austin, Texas 78701.

- Counsel for Respondent at the Court of Appeals was Richard E. Wetzel, 1411 West Avenue, Suite 100, Austin, Texas 78701.

- Counsel for the State at trial was Whitney Wester, Natalie McKinnon and Jamie Felicia, Assistant District Attorneys, 405 Martin Luther King Street, Box 1, Georgetown, Texas 78626.

- Counsel for the State at the Court of Appeals was William Ward and Rene B. Gonzalez, Assistant District Attorneys, 405 Martin Luther King Street, Box 1, Georgetown, Texas 78626.

- The Elected Prosecutor for the State is Hon. Shawn W. Dick, District Attorney for the 26th Judicial District (Williamson County), 405 Martin Luther King Street, Box 1, Georgetown, Texas 78626.

- Counsel for the State before this Court is Rene B. Gonzalez, Assistant District Attorney, 405 Martin Luther King Street, Box 1, Georgetown, Texas 78626.

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CAUSE NO. _____

IN THE

COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS,
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vs.

ROBERT ERIC WADE, III,
Respondent

STATE'S PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, Appellee, the **STATE OF TEXAS**, by and through the Williamson County District Attorney, the Honorable Shawn W. Dick, and, pursuant to Rule 68.1 of the Texas Rules of Appellate Procedure, files this, its Petition for Discretionary Review in the above-styled proceeding, and in support thereof, would show this Honorable Court as follows:

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument: The State believes that decisional process would be significantly aided by oral argument. This case is primarily about the inclusion of an instruction of a lesser included offense; however, the case is also about a court's obligation to fairly consider when a lesser offense is a valid, rational alternative to the charged offense. Conversation will assist the Court in deciding these issues in a way that best serves the charge decisions in criminal cases.

STATEMENT OF THE CASE

Respondent was charged with Aggravated Assault causing serious bodily injury. The jury found Respondent guilty and further found Respondent used or exhibited a deadly weapon in the commission of the offense. The court of appeals reversed the conviction and remanded the case for a new trial, finding that the trial court erred in failing to include a lesser included offense instruction in the jury charge.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals reversed the conviction and sentence herein in a published opinion. *Wade v. State*, __ S.W.3d __, 03-18-00712-CR, 2020 WL

253345, at *1 (Tex. App.—Austin Jan. 16, 2020, pet. filed). The State's petition is due on February 18, 2020.

GROUNDS FOR REVIEW

1. Whether conclusory lay testimony can contradict undisputed testimony from medical sources and a victim on the issue of serious bodily injury such that a lesser-included offense is a "valid, rational alternative" to the charged offense.

2. Whether there is a need to review a defendant's entitlement to a lesser-included instruction when the jury not only convicted on the charged offense but also answered a deadly weapon special issue in the affirmative.

SUMMARY OF ARGUMENT

The Court of Appeals below reversed the Respondent's conviction and remanded this cause for a new trial because the Court found that the trial court erred in denying Respondent an instruction on a lesser offense. The State argues that Respondent was not entitled to an instruction on a lesser offense because Respondent's conclusory opinion about the extent of the victim's injury, in light of the entire record which included substantial undisputed evidence about the severity of the injury, was not sufficient to establish the lesser offense was a valid, rational

alternative to the charged offense. Moreover, the State argues that Court of Appeals erred in finding that any error in the trial court was harmful, because the jury is presumed to have followed the charge and its oath; therefore, the jury's conviction on the submitted offense, supported by legally sufficient evidence, shows the jury was neither confused nor recalcitrant and further analysis is unnecessary. Additionally, the jury's finding that Respondent used his teeth as a deadly weapon herein shows that any testimony supporting the omitted lesser-included offense was simply not believed.

ARGUMENT & AUTHORITIES

Summary of Relevant Facts

Respondent was charged with aggravated assault causing serious bodily injury. Specifically, the indictment charged that he "intentionally, knowingly, or recklessly caused serious bodily injury to [victim] by biting off … [victim's] earlobe." C.R. 37. The indictment also contained a separate deadly-weapon notice that Respondent used or exhibited a deadly weapon, namely the defendant's teeth, during the commission of the offense. C.R. 37. The evidence at trial was undisputed that Respondent had, in fact, bitten off a portion of the victim's ear, using only the Respondent's teeth. The extent of the injury, that is the portion of the ear amputated,

was also undisputed. The State offered the testimony of the responding police officer, 8 R.R. 257-258; S.X. 13-15, the responding paramedic, 8 R.R. 327-331, and the victim in support of the extent of the injury. 9 R.R. 107-108, 112. The hospital records were also introduced into evidence, which described the severity of the injury. SX 30-31. Respondent testified and admitted that he had assaulted the victim while defending himself, 10 R.R. 189, 192-194, but denied that the victim had suffered serious bodily injury. 10 R.R. 236, 241. Respondent requested a lesser-included instruction on assault causing bodily injury, which was denied. 10 R.R. 297. The court of appeals found that Respondent's conclusory opinion constituted some evidence that entitled him to a lesser included instruction.

First Ground for Review

Whether a lesser included instruction based solely on defendant's conclusory lay opinion about the severity of a victim's injury, which contradicts undisputed testimony on the issue of serious bodily injury, is a "valid, rational alternative" to the charged offense.

At trial, Respondent testified that if saw the victim on the street, he would not notice any difference between his ears. 10 R.R. 241. The Court of Appeals noted that Respondent's "description of the current state of the injury would seem to have

provided a basis upon which a jury could infer that the injury was not a severe and permanent disfigurement when it was inflicted." *Wade v. State*, __ S.W.3d __, 2020 WL 253345, at *6 (Tex. App.—Austin Jan. 16, 2020, pet. filed). In making this determination, the Court of Appeals noted that a defendant's testimony alone is sufficient to raise the issue of whether a lesser-included instruction should be given. *Id*.

Courts apply the *Aguilar/Rousseau* test to determine whether an instruction on a lesser-included offense should be given to the jury. *Cavazos v. State*, 382 S.W.3d 377, 382 (Tex. Crim. App. 2012). The State concedes that assault causing bodily injury is a lesser included offense of aggravated assault causing serious bodily injury under the first prong of this test. *See* Tex. Code Crim. Proc. Art. 37.09 (defining a lesser-included offense).

Under the second prong of the test, the court asks the well-known question whether any evidence was adduced at trial that would permit a jury to rationally find that the defendant, if guilty, is guilty only of the lesser-included offense. *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007); *Bignall v. State*, 887 S.W.2d 21, 23-24 (Tex. Crim. App. 1994). This Court has noted, however, that the evidence must establish that the lesser-included offense is "*a valid, rational alternative to the charged offense*." *Hall*, 225 S.W.3d at 536 (*quoting Forest v. State*, 989 S.W.2d 365,

367 (Tex. Crim. App. 1999)). The court determines whether the lesser offense is a valid, rational alternative to the charged offense by examining the evidence tending to support the lesser offense "*in the context of the entire record*"; but, the court does not make any credibility assessments when conducting the lesser-included analysis." *Hall v. State*, 158 S.W.3d 470, 473 (Tex. Crim. App. 2005); *Goad v. State*, 354 S.W.3d 443, 446-47 (Tex. Crim. App. 2011); *Young v. State*, 283 S.W.3d 854, 875-76 (Tex. Crim. App. 2009).

In the present case, the evidence presented included substantial testimony about the victim's injury, medical records, and photographs of the injury prior to being treated by medical providers. 8 R.R. 257-258, 327-331; 9 R.R. 107-108, 112; S.X. 13-15, 25, 30, 31. This evidence reflected that the lower portion of the victim's ear was bitten off and found on the ground. The jury also viewed the victim's injury at trial, as the victim was asked to come down from the witness stand and allow the jury to have a good look at the ear. 9 R.R. 119.

Against this evidence, Respondent took the stand and denied in conclusory statement that the missing portion of the ear constituted serious bodily injury. 10 R.R. 236. Respondent further stated that if he saw the victim walking down the street at the time of trial, Respondent would not even notice the injury. 10 R.R. 241. The court of appeals cites these statements as a negation of any serious bodily injury and

therefore constitutes some evidence that if Respondent is guilty, he is guilty only of the lesser offense of assault causing bodily injury. However, the court of appeals does not explain how this interpretation is "a valid, rational alternative" to the charged offense. The court of appeals' interpretation is especially irrational "in the context of the entire record" demonstrating that a part of the victim's body was lying on the floor after the incident! All the evidence must be examined, and it is not rational that a factfinder would take as solemn truth Respondent's conclusory, self-serving testimony while ignoring or disbelieving the uncontradicted evidence concerning the severity of the victim's injury. A statement made by a defendant cannot be "plucked out of the record and examined in a vacuum" in a lesser included analysis, *Ramos v. State*, 865 S.W.2d 463, 465 (Tex. Crim. App. 1993), yet, this is exactly what the court of appeals has opted to do herein.

If the court of appeals decision is allowed to stand unaltered, then all that will be required for a defendant to obtain a lesser-included offense instruction is for the defendant to take the stand and deny reality, as evidenced by otherwise undisputed facts in the record. The analysis of the court of appeals' opinion makes no provision for a trial court to consider whether, in the context of the entire record, the lesser offense is a valid, rational alternative to the charged offense. The effect of the court of appeals' opinion, could then be carried to its logical (or illogical) conclusion in

some very disturbing ways – for example, a defendant would now be able to take the stand in a murder case and opine that he does not believe the victim is truly deceased, thus entitling him to a lesser offense instruction on a lesser misdemeanor assault. Clearly, this Court did not intend this result when it stated in *Hall* that, in the context of the entire record, the evidence must establish that a lesser-included offense is a valid, rational alternative to the charged offense.

Requiring that evidence establish a valid, rational basis for a verdict is commonplace in our justice system. In the civil realm, the courts have long since recognized that conclusory, baseless opinions, such as the Respondent's, even when admitted without an objection, are not considered probative evidence. *See, e.g., City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009) ("Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence."); *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004) (observing that "conclusory or speculative" opinions are " 'incompetent evidence' ... [that] cannot support a judgment"); *Dallas Ry. & Terminal Co. v. Gossett*, 156 Tex. 252, 294 S.W.2d 377, 380 (1956) ("It is well settled that the naked and unsupported opinion or conclusion of a witness does not constitute evidence of probative force and will not support a jury finding even when admitted without objection."); *Casualty Underwriters v. Rhone*, 134 Tex. 50, 132

S.W.2d 97, 99 (1939) (holding that "bare conclusions" of lay fact witnesses did not "amount to any evidence at all," and that "the fact that they were admitted without objection add[ed] nothing to their probative force"). Likewise, in criminal prosecutions, in order for a defendant to demonstrate that he is entitled to a lesser-included instruction he must point the court to evidence that, in the context of all the evidence, establishes the lesser-included offense is "a valid, rational alternative to the charged offense." The result of this rule demands that a defendant not be permitted to obtain a lesser-included offense instruction by merely providing a conclusory, speculative lay opinion that contradicts the whole of the trial record. *See Brownlow v. State*, 2020 WL 718026, at *8-9, AP-77,068 (Tex. Crim. App. February 12, 2020) (not designated for publication) (holding that defendant's statement that "it wasn't no robbery" was not, in light of the entire record, sufficient to establish the lesser offense was a valid, rational alternative to the charged offense).

Accordingly, this Court should grant review of this issue to determine whether a conclusory, lay opinion about the severity of a victim's injury can contradict essentially undisputed testimony from medical sources and the victim on the issue of serious bodily injury such that, in the context of the entire record, a defendant is entitled to a lesser-included offense is a "valid, rational alternative" to the charged offense.

Second Ground for Review

Whether the defendant is entitled to a lesser-included instruction when the jury not only convicted on the charged offense but also answered a deadly weapon special issue in the affirmative.

The Court of Appeals below stated that the harm perceived by the denial of a lesser-included offense is the risk that the jury will disregard its oath if it has only one "guilty" option. *Wade*, 2020 WL 253345, at *7 (*quoting Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995)); *see also Grey v. State*, 298 S.W.3d 644, 648-50 (Tex. Crim. App. 2009). However, this justification cannot be reconciled with the axiom that, "absent evidence to the contrary, we presume the jury followed the law provided by the charge." *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If, like in every other context, the jury is presumed to have followed the charge and its oath, the result should be that conviction on the submitted offense, if supported by legally sufficient evidence, shows the jury was neither confused nor recalcitrant and so further analysis is unnecessary. *See Barrios v. State*, 283 S.W.3d 348, 353 (Tex. Crim. App. 2009) (an inartful instruction regarding lessers "could perhaps confuse a jury, although there is no indication that it did so in this case: the jury found appellant guilty of the greater offense.").

Even if it were good policy to openly entertain the theory that jurors disregard their oaths and convict defendants they know are innocent of the charged offense, reversal for charge error requires actual, rather than theoretical, harm. *Almanza v. State*, 686 S.W.2d 157, 174 (Tex. Crim. App. 1985). Further, any theoretical harm is diminished or eliminated when, as in this case, the jury is given a special issue on use of a deadly weapon. *See e.g., Saunders*, 913 S.W.2d at 574 (holding that submission will not invariably render harmless any error in refusing to submit another lesser-included offense but that it can be harmless on particular facts). In this case, the jury sent out no notes and convicted appellant of aggravated assault causing serious bodily injury in two hours and 46 minutes. 10 R.R. 345. Additionally, the jury was asked, in a special issue, whether Respondent used his teeth as a deadly weapon. The jury answered the special issue concerning the use of a deadly weapon in the affirmative and found that Respondent used or exhibited his teeth in a manner of use or intended use that was capable of causing death or *serious bodily injury*. C.R. 180-81. The jury's verdict finding Respondent guilty of aggravated assault causing serious bodily injury is entirely consistent with the jury finding that Respondent used or exhibited his teeth as a deadly weapon. Accordingly, there is no evidence of jury confusion or misconduct, any error in failing to submit

a lesser offense the jury apparently would not have utilized should be deemed harmless.

Therefore, a full harm analysis demonstrates the "realistic probability" is that the jury only considered the victim's injury to be serious bodily injury. *See, e.g. Saunders*, 913 S.W.2d at 573 (holding that Saunders was not harmed because the debate was between intent and indifference to perceived risk, not lack of perception). The entirety of the court of appeals' argument is that Respondent's conclusory lay opinion that the missing portion of victim's ear was not serious bodily injury was some evidence that Respondent was guilty only of the lesser offense of assault causing bodily injury. It would be nonsensical to conclude that the jury would have found that the victim did not suffer serious bodily injury, when the jury also answered the special issue in the affirmative, essentially finding that Respondent used his teeth in such a manner that was capable of causing serious bodily injury. On this record, the jury's decision to find that Respondent used his teeth as a deadly weapon capable of causing serious bodily injury shows that any testimony supporting the omitted lesser-included offense was simply not believed. Accordingly, any error herein was harmless.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that this Court will grant this Petition for Discretionary Review, that the case be set for submission, and that after submission, this Court will reverse the decision of the Court of Appeals and affirm the trial court's conviction and sentence.

Respectfully Submitted,

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By: */s/ René B. González*
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CERTIFICATE OF COMPLIANCE

I certify that this document contains 2,793 words (excluding those portions excepted from calculation under Rule 9.4(i)). The body text is in 14-point font, and the footnote text is in 12-point font.

/s/ René B. González
René B. González

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing State's Petition for Discretionary Review was electronically served upon Appellant's counsel of record, Mr. Richard E. Wetzel, 1411 West Avenue, Suite 100, Austin, Texas 78701, at wetzel_law@1411west.com and upon the Office of the State Prosecuting Attorney, Post Office Box 13046, Austin, Texas 78711-3046, at information@spa.texas.gov on the 18th day of February, 2020.

/s/ René B. González
René B. González

APPENDIX

Opinion of the Court of Appeals…….....Tab A

2020 WL 253345
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Austin.

Robert Eric WADE, III, Appellant
v.
The STATE of Texas, Appellee

NO. 03-18-00712-CR
|
Filed: January 16, 2020

Synopsis

Background: Defendant was convicted in the 26th District Court, Williamson County, No. 16-2156-K26, Suzanne Brooks, J., of aggravated assault and sentenced to five years' imprisonment and placed on seven years community supervision. Defendant appealed.

Holdings: The Court of Appeals, Thomas J. Baker, J., held that:

[1] evidence was legally sufficient to establish that defendant caused victim serious bodily injury;

[2] defendant was entitled to lesser included-offense jury instruction of assault;

[3] factor addressing jury charge as a whole weighed in favor of finding that trial court's error in failing to include assault as lesser included-offense of aggravated assault in jury charge caused defendant some harm;

[4] factor addressing arguments of counsel weighed in favor of finding that trial court's error caused defendant some harm;

[5] factor addressing entirety of evidence either weighed in favor or was neutral regarding whether trial court's error caused defendant some harm; and

[6] factor addressing other relevant factors present in record weighed in favor of finding that trial court's error caused defendant some harm.

Reversed and remanded.

West Headnotes (31)

[1] Criminal Law
Construction of Evidence

Criminal Law
Reasonable doubt

Under a legal-sufficiency standard of review, appellate courts view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

[2] Criminal Law
Conclusiveness of Verdict

When performing a legal-sufficiency standard of review, an appellate court must bear in mind that it is the factfinder's duty to weigh the evidence, to resolve conflicts in the testimony, and to make reasonable inferences from basic facts to ultimate facts. Tex. Crim. Proc. Code Ann. art. 36.13.

[3] Criminal Law
Deliberations in General

Criminal Law
Application of personal knowledge of jurors

Under a legal-sufficiency standard of review, the factfinder is free to apply common sense, knowledge, and experience gained in the ordinary affairs of life in drawing reasonable inferences from the evidence.

[4] Criminal Law
Weight and sufficiency

Criminal Law

Construction of Evidence

Criminal Law

Inferences or hypotheses from evidence

Under a legal-sufficiency standard of review, appellate courts must determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict.

[5] Criminal Law

Inferences or deductions from evidence

Under a legal-sufficiency standard of review, appellate courts presume that conflicting inferences were resolved in favor of the conviction and defer to that determination.

[6] Criminal Law

Circumstantial Evidence

Criminal Law

Relative strength of circumstantial and direct evidence

Under a legal-sufficiency standard of review, courts must bear in mind that direct and circumstantial evidence are treated equally and that circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor and can be sufficient on its own to establish guilt.

[7] Criminal Law

Verdict unsupported by evidence or contrary to evidence

Criminal Law

Reasonable doubt

The evidence is legally insufficient if the record contains no evidence, or merely a modicum of evidence, probative of an element of the offense or if the evidence conclusively establishes a reasonable doubt.

[8] Assault and Battery

Assault with intent to do great bodily harm

The distinction between bodily injury and serious bodily injury, for purposes of aggravated assault, is often a matter of degree and the distinction must be determined on a case-by-case basis. Tex. Penal Code Ann. §§ 22.01, 22.02.

[9] Assault and Battery

Assault with intent to do great bodily harm

Evidence was legally sufficient to establish that defendant caused victim serious bodily injury, as supported conviction for aggravated assault; defendant bit off portion of victim's ear, doctors were unable to reattach victim's earlobe, victim's left earlobe was amputated, victim received 11 stitches, including stitches to reattach bottom part of victim's ear to his head, victim continued to experience pain at time of trial if his ear was directly touched, and victim was disfigured for life because of injury to his ear. Tex. Penal Code Ann. §§ 1.07(a)(46), 22.02.

[10] Assault and Battery

Assault with intent to do great bodily harm

There are no wounds that constitute serious bodily injury per se, as element of aggravated assault. Tex. Penal Code Ann. §§ 22.01, 22.02.

[11] Assault and Battery

Assault with intent to do great bodily harm

When reviewing an aggravated assault conviction, appellate court must evaluate each case on its own facts to determine whether the evidence sufficed to permit the jury to reasonably conclude that the injury fell within the definition of serious bodily injury. Tex. Penal Code Ann. §§ 22.01, 22.02.

[12] Assault and Battery

Assault with intent to do great bodily harm

In assessing the sufficiency of the evidence to establish serious bodily injury, for purposes of aggravated assault, the question is the degree of risk of death that the injury caused, or the disfiguring or impairing quality of the injury, as

it was inflicted, not after the effects had been ameliorated or exacerbated by other actions such as medical treatment. Tex. Penal Code Ann. §§ 22.01, 22.02.

[13] Assault and Battery

Assault with intent to do great bodily harm

Simply that an injury causes scarring is not sufficient, on its own, to establish serious permanent disfigurement, for purposes of aggravated assault. Tex. Penal Code Ann. §§ 22.01, 22.02.

[14] Assault and Battery

Assault with intent to do great bodily harm

There must be evidence of some significant cosmetic deformity caused by the injury to establish serious permanent disfigurement, for purposes of aggravated assault. Tex. Penal Code Ann. §§ 22.01, 22.02.

[15] Assault and Battery

Instructions

Defendant was entitled to lesser included-offense jury instruction of assault in prosecution for aggravated assault, although defendant admitted that during altercation with victim, defendant bit victim's ear hard enough to remove earlobe and that victim's ear was disfigured in assault; assault was lesser included offense of charged offense of aggravated assault, defendant denied more than once that his actions resulted in serious bodily injury, defendant explained that if he saw victim on street he would not have noticed any difference between victim's ears, and defendant's description of current state of injury would have provided basis upon which jury could have inferred that injury was not severe and permanent disfigurement when it was inflicted. Tex. Crim. Proc. Code Ann. art. 37.09; Tex. Penal Code Ann. §§ 1.07(a)(46), 22.01(a)(1), 22.02.

[16] Criminal Law

Relation between offenses; sufficiency of charging instrument

When determining if a defendant is entitled to a lesser-offense jury instruction, court first must determine whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense, which is a matter of law.

[17] Criminal Law

Relation between offenses; sufficiency of charging instrument

When determining whether a requested lesser-offense jury instruction pertains to an offense that is a lesser-included offense of the charged offense, an offense is a lesser-included offense if it is within the proof necessary to establish the offense charged.

[18] Criminal Law

Reasonable or rational basis

When determining if a defendant is entitled to a lesser-offense jury instruction, there must be evidence from which a rational jury could find the defendant guilty of only the lesser offense.

[19] Criminal Law

Evidence Justifying or Requiring Instructions

A defendant is entitled to a lesser-offense instruction if there is (1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense.

[20] Criminal Law

Some, any, slight, or weak evidence

Criminal Law

Instructions

On review from the denial of a request for lesser-offense instruction, the Court of Appeals will consider all the evidence admitted at trial, not just the evidence presented by the defendant, and if there is more than a scintilla of evidence raising the lesser offense and negating or rebutting an element of the greater offense, the defendant is entitled to a lesser-charge instruction.

[21] Criminal Law

Evidence Justifying or Requiring Instructions

It does not matter whether the evidence is controverted or even credible, nor does it matter whether that evidence is weak or strong, if the evidence raises the issue, the trial court must include a lesser included offense instruction in the jury charge.

[22] Criminal Law

Instructions in general

If an appellate court determines that there is error present in a jury charge, it must then evaluate the harm caused by the error.

[23] Criminal Law

Objections in General

Criminal Law

Instructions in general

The amount of harm needed for a reversal based on error present in a jury charge depends on whether a complaint regarding that error was preserved in the trial court.

[24] Criminal Law

Instructions in general

If a defendant made a timely objection to error in a jury charge, reversal is required if there has been some harm.

[25] Criminal Law

Prejudice to rights of party as ground of review

An error which has been properly preserved by objection will call for reversal as long as the error is not harmless.

[26] Criminal Law

Instructions

When reviewing jury charge error under the harmless error test, reviewing courts consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record.

[27] Criminal Law

Prejudice to rights of party as ground of review

Although the harmless error standard is less stringent than the analysis performed when an objection is not made, the reviewing court must still find that the defendant suffered some actual, rather than merely theoretical, harm from the error.

[28] Criminal Law

Grade or degree of offense; included offenses; punishment

Factor addressing jury charge as a whole weighed in favor of finding that trial court's error in failing to include assault as lesser included-offense of aggravated assault in jury charge caused defendant some harm, although abstract portion of jury charge included instruction on simple assault as well as aggravated assault, and defined terms bodily injury and serious bodily injury; application paragraph did not contain any instructions authorizing jury to find defendant guilty of assault as opposed to aggravated assault, same definition for serious bodily injury formed basis for conviction and for deadly-weapon finding, and during its closing argument, State told jury twice that if it found defendant guilty of charged offense, deadly-weapon issue was necessarily true. Tex. Penal Code Ann. §§ 1.07(a)(46), 22.01(a)(1), 22.02.

[29] Criminal Law

Grade or degree of offense; included offenses; punishment

Factor addressing arguments of counsel weighed in favor of finding that trial court's error in failing to include assault as lesser included-offense of aggravated assault in jury charge caused defendant some harm, although during State's opening argument, it asserted that victim had permanent disfigurement because defendant bit off part of his ear; State did not assert that injury was serious permanent disfigurement, none of witnesses at trial described injury as serious permanent disfigurement, victim did not use word serious to describe his own injury, and none of treating physicians provided any expert testimony regarding severity of injury. Tex. Penal Code Ann. §§ 1.07(a)(46), 22.01(a)(1), 22.02.

[30] Criminal Law

Grade or degree of offense; included offenses; punishment

Factor addressing entirety of evidence either weighed in favor or was neutral regarding whether trial court's error in failing to include assault as lesser included-offense of aggravated assault in jury charge caused defendant some harm, although evidence was legally sufficient to support inference that injury, losing part of ear, to victim qualified as serious permanent disfigurement; severity of injury was one of primary contested issues, no witnesses, including victim, used word "serious" when describing injury, defendant testified that injury was not serious, and defendant stated that he would not have noticed any difference between victim's ears if he did not know of injury. Tex. Penal Code Ann. §§ 1.07(a)(46), 22.01(a)(1), 22.02.

[31] Criminal Law

Grade or degree of offense; included offenses; punishment

Factor addressing other relevant factors present in record weighed in favor of finding that trial court's error in failing to include assault as lesser included-offense of aggravated assault in jury charge caused defendant some harm, although defendant was ultimately placed on community supervision when he was sentenced; jury assessed his punishment at five years' imprisonment, and that sentence was longer than maximum sentence allowed for simple assault. Tex. Penal Code Ann. §§ 1.07(a)(46), 22.01(b), 22.02.

FROM THE 26TH DISTRICT COURT OF WILLIAMSON COUNTY, NO. 16-2156-K26, THE HONORABLE SUZANNE BROOKS, JUDGE PRESIDING

Attorneys and Law Firms

Richard E. Wetzel, for Appellant.

William Lee Ward, Stacey M. Soule, for Appellee.

Before Justices Goodwin, Baker, and Kelly

OPINION

Thomas J. Baker, Justice

***1** Robert Eric Wade, III, was charged with aggravated assault. *See* Tex. Penal Code § 22.02. [1] At the end of the guilt-or-innocence phase, the jury found Wade guilty of the charged offense. At the end of the punishment phase, the jury recommended that Wade be sentenced to five years' imprisonment and that he be placed on community supervision. *See id.* §§ 12.33, 22.02(b). The district court rendered its judgment of conviction in accordance with the jury's verdicts and placed Wade on community supervision for seven years. On appeal, Wade contends that the evidence supporting his conviction was insufficient and that the district court should have included an instruction in the jury charge for the lesser included offense of assault. We will reverse the district court's judgment of conviction and remand for a new trial.

BACKGROUND

As set out above, Wade was charged with committing aggravated assault. Specifically, the indictment alleged that Wade "intentionally, knowingly, or recklessly caused serious bodily injury to **Taylor Sughrue, by biting off ... Sughrue's earlobe**" in July 2016. The indictment also contained a separate deadly-weapon notice alleging that Wade "used or exhibited a deadly weapon, namely, **the defendant's** teeth, during the commission of" the offense. The undisputed evidence presented at trial established that Sughrue was dating Wade's ex-wife, Christina Reale, and was in her home at the time of the offense. The undisputed evidence also established that Reale and Wade were divorced in 2014 but that they started dating again in 2015. The evidence is disputed regarding whether Reale was also dating Wade at the time of the offense.

During the trial, the State called the following individuals to the stand: Sughrue; K.R., who is Reale's daughter; Officer Michael Silva, who responded to a 911 call regarding the incident; and paramedic James Baker, who also responded to the 911 call. In his testimony, Officer Silva explained that the bed in Reale's master bedroom "was covered with blood" when he arrived, that Sughrue "had a substantial amount of blood around his face and head," and that "a portion of [Sughrue's] earlobe [wa]s missing." Similarly, Baker explained in his testimony that Sughrue had blood on his face, that Sughrue had "an amputation of the left earlobe," that he transferred Sughrue to the hospital to see if the lobe could be reattached, that the wound had "minimal active bleeding" by the time that he treated Sughrue, that Sughrue described the pain as "seven out of ten," and that Sughrue refused any pain medication. During Baker's testimony, his incident report as well as the medical records from the hospital were admitted into evidence.

In her testimony, K.R. related that Sughrue was intoxicated on the night in question and that Reale helped him walk to the master bedroom. Further, K.R. recalled that she later heard Wade and Reale arguing outside, that Wade walked into the house, and that Wade headed for the master bedroom. Regarding the alleged offense, K.R. testified that Wade got on top of Sughrue while Sughrue was sleeping, that Wade's face got near Sughrue's ear, and that Sughrue screamed in a way that she had "never heard anybody scream like ... before."

***2** Next, the State called Sughrue to the stand. In his testimony, Sughrue stated that he fell asleep in Reale's bed but woke up after he felt someone on top of him beating him. Next, Sughrue described experiencing something painful on his ear and neck area and then noticing blood was "pouring off" his ear. When describing the injury, Sughrue stated that Wade "had pulled away and ... ripped" his ear "away a little bit from [his] actual head." Further, Sugrue explained that he still had nerve damage at the time of trial that causes him excruciating pain if the ear is directly touched or bent in certain ways. Sugrue testified that the doctors treating his injury were unable to reattach the earlobe, that he was given eleven stitches to close the wound, and that the bottom part of his ear was reattached to his head. Further, Sughrue admitted that he was "devastated" when he learned that the earlobe could not be reattached because he would "be disfigured for the rest of [his] life." Similarly, Sughrue stated that he was permanently disfigured by the assault. During his testimony, Sughrue stepped down from the witness stand to allow the jury to examine his ears.

After the State rested, Wade testified that K.R. told him that Reale was having an affair a month before the incident in question but that he continued his relationship with Reale after she stated that she was no longer seeing Sughrue. Further, Wade recalled that he had made plans with Reale on the night in question but that she told him that she had to cancel because she was going to spend the day with her brother. Next, Wade testified that he texted with Reale throughout the day, that he went to Reale's home to see if she was there, that he could not enter the home because it was locked, that he waited outside the home, and that he eventually saw a car drive to the house with Reale, K.R., and Sughrue inside. Additionally, Wade stated that he texted Reale after she got home, that she met him outside, and that they argued. Moreover, Wade testified that Sughrue opened the door and pushed him against a wall, that he pushed back, that they fell to the floor inside the home, that they wrestled, that Sughrue had something in his hand, that Sughrue hit him with the object in his hand, and that Sughrue ran to the master bedroom. Additionally, Wade stated that he ran after Sughrue because he wanted "to finish it" and because he did not know what Sughrue might have in the bedroom, that he lunged toward Sughrue, that he tackled Sughrue, that they wrestled on the bed, and that Sughrue placed him in a headlock. When describing the incident in question, Wade related that he closed his eyes and bit Sughrue because Sughrue would not release him, that he did not know what he was biting, that Sughrue screamed and released him, that

he felt something soft in his mouth, and that he spit the object out. In addition, although he denied intending to bite Sughrue's earlobe off, Wade admitted that he opened his mouth, put his teeth around Sughrue's ear, and bit down hard enough to sever the earlobe. When describing the injury, Wade acknowledged that Sughrue's ear was disfigured but denied that Wade suffered serious bodily injury and further stated that if he saw Sughrue on the street and did not know who Sughrue was, he would be unable to notice any difference between Sughrue's two ears.

After Wade rested, a charge conference was convened. During the charge conference, Wade requested an instruction on the lesser included offense of assault, but the district court denied that request. At the end of the trial, Wade was convicted of the charged offense, and the jury returned a separate finding specifying that Wade used or exhibited a deadly weapon during the offense.

Wade appeals his conviction.

DISCUSSION

On appeal, Wade argues that the evidence presented at trial is legally insufficient to support his conviction and that the district court erred by failing to include an instruction on the lesser included offense of assault.

Sufficiency of the Evidence

[1] [2] [3] [4] [5] [6] [7] Under a legal-sufficiency standard of review, appellate courts view the evidence in the light most favorable to the verdict and determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). When performing this review, an appellate court must bear in mind that it is the factfinder's duty to weigh the evidence, to resolve conflicts in the testimony, and to make "reasonable inferences from basic facts to ultimate facts." *Id.*; *see also* Tex. Code Crim. Proc. art. 36.13 (explaining that "jury is the exclusive judge of the facts"). The factfinder is "free to apply common sense, knowledge, and experience gained in the ordinary affairs of life in drawing reasonable inferences from the evidence." *Eustis v. State*, 191 S.W.3d 879, 884 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd). Appellate courts must "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). Furthermore, appellate courts presume that conflicting inferences were resolved in favor of the conviction and "defer to that determination." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). In addition, courts must bear in mind that "direct and circumstantial evidence are treated equally" and that "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor" and "can be sufficient" on its own "to establish guilt." *Kiffe v. State*, 361 S.W.3d 104, 108 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). The evidence is legally insufficient if "the record contains no evidence, or merely a 'modicum' of evidence, probative of an element of the offense" or if "the evidence conclusively establishes a reasonable doubt." *Id.* at 107 (quoting *Jackson*, 443 U.S. at 320, 99 S.Ct. 2781).

***3 [8] [9]** As set out above, Wade was convicted of aggravated assault for causing serious bodily injury to Sughrue by biting off a portion of Sughrue's ear. Under the Penal Code, a person commits assault if he "intentionally, knowingly, or recklessly causes bodily injury to another," Tex. Penal Code § 22.01, and commits aggravated assault if he commits assault and "causes serious bodily injury to another," *id.* § 22.02. The legislature has defined " '[b]odily injury' " as meaning "physical pain, illness, or any impairment of physical condition," *id.* § 1.07(a)(8), and " '[s]erious bodily injury' " as meaning, in relevant part, "bodily injury that ... causes ... serious permanent disfigurement," *id.* § 1.07(a)(46). "The distinction between 'bodily injury' and 'serious bodily injury' is often a matter of degree and the distinction must be determined on a case-by-case basis." *Reyes v. State*, No. 03-15-00233-CR, 2017 WL 1130373, at *4 (Tex. App.—Austin Mar. 23, 2017, pet. struck) (mem. op., not designated for publication).

[10] [11] [12] [13] [14] "[T]here are no wounds that constitute 'serious bodily injury' per se." *Jackson v. State*, 399 S.W.3d 285, 292 (Tex. App.—Waco 2013, no pet.) (quoting *Hernandez v. State*, 946 S.W.2d 108, 111 (Tex. App.—El Paso 1997, no pet.)). Instead, reviewing courts "must evaluate each case on its own facts to determine whether the evidence sufficed to permit the jury to reasonably conclude that the injury fell within the definition of 'serious bodily injury.' " *Reyes*, 2017 WL 1130373, at *4. "[I]n assessing the sufficiency of the evidence to establish serious bodily injury, the question is the degree of risk of death that the injury caused, or the disfiguring or impairing quality of the injury,

'as it was inflicted, not after the effects had been ameliorated or exacerbated by other actions such as medical treatment.' " *Stuhler v. State*, 218 S.W.3d 706, 714 (Tex. Crim. App. 2007) (quoting *Fancher v. State*, 659 S.W.2d 836, 838 (Tex. Crim. App. 1983)). "Simply that an injury causes scarring is not sufficient, on its own, to establish serious permanent disfigurement." *Wright v. State*, 494 S.W.3d 352, 362 n.5 (Tex. App.—Eastland 2015, pet. ref'd). Rather, "[t]here must be evidence of some significant cosmetic deformity caused by the injury." *Hernandez*, 946 S.W.2d at 113 (observing that "[d]isfigurement, like beauty, is in the eye of the beholder"); *cf. Hatfield v. State*, 377 S.W.2d 647, 649 (Tex. Crim. App. 1964) (determining that evidence that victim had cut lip, lost teeth, had stiff neck, and required hospitalization was "sufficient to sustain the jury's finding that serious bodily injury was inflicted upon him").

When presenting his sufficiency challenge, Wade concedes that the evidence established that Sughrue sustained bodily injury on the night in question and that the evidence shows that he assaulted Sughrue, but he asserts that the evidence did not establish that he committed aggravated assault because the evidence did not show that Sughrue sustained serious bodily injury. As support for his assertion, Wade highlights that Sughrue "did not characterize any disfigurement" that he sustained in the assault "as serious." Similarly, Wade contends that the medical records and the testimony from the paramedic who responded to the scene did not establish that "Sughrue sustained serious permanent disfigurement." Further, Wade points to portions of his own testimony in which he denied causing serious bodily injury to Sughrue and in which he explained that if he saw Sughrue now, he would not notice any difference between Sughrue's two ears.

During the trial, EMS records for the night in question and medical records from the hospital where Sughrue was treated were admitted into evidence. The EMS records reflect that Sughrue sustained a "[t]raumatic injury," that his left earlobe had been amputated, that he had pain in his left ear following an assault while he was sleeping, and that there was "quite a bit of blood" at the scene. Similarly, the hospital records describe the injury as a "large complex laceration to the left ear externally with loss of the ear lobe," as "10 cm" long, as an amputation, as extending "into the cartilage," and as requiring "11 sutures." *Cf. Reyes*, 2017 WL 1130373, at *5 (noting that evidence regarding wounds and medical treatment performed "demonstrated more than just scarring"). The hospital records also say that Sughrue was assaulted and had dried blood on his chest; that he was experiencing pain at a level of seven that was constant, tender, and sharp; and that he continued to experience pain while sleeping before the sutures were removed.

***4** In addition, photographs of Reale's bedroom and of Sughrue after the assault were admitted into evidence. The photos of Reale's bedroom show a significant amount of blood on the sheets and comforter. The photos of Sughrue show blood on his face and on other parts of his body and document that the earlobe was removed.

At trial, K.R. testified that she heard Sughrue scream during the assault in a way that she had "never heard anyone scream like ... before." Following K.R.'s testimony, Sughrue explained that on the night in question he woke up when someone punched him in the face and that he felt pain on his left ear. When describing the injury, Sughrue explained that Wade pulled his ear away from his head after biting it and that he was covered in blood. Further, Sughrue related that doctors were unable to reattach his earlobe. Moreover, Sughrue explained that he received eleven stitches, including stitches to reattach the bottom part of his ear to his head, and that he continued to experience pain at the time of the trial if his ear is directly touched. Sughrue also testified that he will be disfigured for life because of the injury to his ear. *See id.* at *5 (noting that location of injury on face was relevant consideration); *Jackson*, 399 S.W.3d at 292 (explaining that "[t]he person who sustained the injury at issue is qualified to express an opinion about the seriousness of that injury"). During his testimony, Sughrue stepped down from the witness stand for the jury to examine his ear.

When confronted with a similar issue and with similar evidence, one of our sister courts of appeals concluded that evidence pertaining to an injury caused by biting an earlobe was sufficient to establish serious bodily injury. *See Sizemore v. State*, 387 S.W.3d 824, 830 (Tex. App.—Amarillo 2012, pet. ref'd). In reaching that conclusion, our sister court noted that photos of the victim's injury to her ear admitted during trial showed "a significant amount of blood in and around the area surrounding [her] ear" and showed "that a piece of her ear is missing" and that her ear is "misshapen." *Id.* at 829. Next, the court highlighted the testimony from the victim in which she related that the defendant bit her ear, that the missing portion of her ear was never found, that she underwent a surgical procedure to attempt to repair the injury, and that she still experienced pain in her ear months later. *Id.* As with Sughrue, the victim "showed her ear to the jury, enabling it to assess the degree of disfigurement." *Id.* Additionally, the

court noted that the medical records described the "wound ... as a 'traumatic injury,' " as "a 'loss of significant section of the lower ear,' " and "as an open wound to the right ear with 'underlying cartilage exposed and desiccated.' " *Id.* Moreover, the court referenced the treating physician's description of the injury as a " 'segment ... approximately 6 cm in length about a centimeter and a half in width' " that is " 'simply gone.' " Finally, the court observed that the records revealed that the initial surgical procedure "did not result in a full reconstruction of the ear." *Id.* at 830. [2]

***5** Given our standard of review and in light of the similarity of the types of evidence, including medical records, describing Sughrue's injury and the victim's injury in *Sizemore* as well as the fact that both juries were given the opportunity to personally observe the injured ears, we similarly conclude that by applying "common sense, knowledge, and experience" and making reasonable inferences from the evidence presented, "the jury could have rationally concluded that" Sughrue "suffered serious permanent disfigurement." *See id.* Accordingly, we conclude that the evidence is legally sufficient to establish that Wade caused Sughrue serious bodily injury. *See* Tex. Penal Code §§ 1.07(a)(46), 22.02.

For these reasons, we overrule Wade's first issue on appeal.

Jury Charge

[15] In his second issue on appeal, Wade contends that the district court erred by failing to include a lesser included-offense instruction. During the trial, Wade requested that the district court provide an instruction on assault because, according to Wade, his testimony was sufficient to warrant the instruction. After considering the parties' arguments, the district court denied the request.

[16] **[17]** Appellate courts "use a two-step analysis to determine if a defendant is entitled to a lesser-offense instruction." *Ritcherson v. State*, 568 S.W.3d 667, 670 (Tex. Crim. App. 2018). "The first step is to determine whether the requested instruction pertains to an offense that is a lesser-included offense of the charged offense, which is a matter of law." *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016). "Under this first step of the test, an offense is a lesser-included offense if it is within the proof necessary to establish the offense charged." *Id.* As a matter of law, assault is a lesser included offense of the charged offense of aggravated assault because "it differs from the charged offense only in the respect that a less serious injury ... suffices to establish its commission." *See* Tex. Code Crim. Proc. art. 37.09; *see also* Tex. Penal Code §§ 22.01(a)(1) (stating that assault occurs when person "intentionally, knowingly, or recklessly causes bodily injury"), .02(a)(1) (providing that assault is aggravated assault if person "causes serious bodily injury to another"). Accordingly, the first step is satisfied here.

[18] **[19]** **[20]** **[21]** To satisfy the second step, "there must be evidence from which a rational jury could find the defendant guilty of only the lesser offense." *Ritcherson*, 568 S.W.3d at 671. "That requirement is met if there is (1) evidence that directly refutes or negates other evidence establishing the greater offense and raises the lesser-included offense or (2) evidence that is susceptible to different interpretations, one of which refutes or negates an element of the greater offense and raises the lesser offense." *Id.* Appellate courts "consider all the evidence admitted at trial, not just the evidence presented by the defendant, and if there is more than a scintilla of evidence raising the lesser offense and negating or rebutting an element of the greater offense, the defendant is entitled to a lesser-charge instruction." *Id.* "It does not matter whether the evidence is controverted or even credible," *id.*, nor does it matter "whether that evidence is weak or strong," *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999). "If the evidence raises the issue, the trial court must include an instruction in the jury charge." *Ramirez v. State*, 263 S.W.3d 40, 42 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

During his testimony, Wade admitted that during an altercation with Sughrue, he bit Sughrue's ear hard enough to remove the earlobe and that Sughrue's ear was disfigured in the assault. But Wade denied more than once that his actions resulted in a serious bodily injury. Additionally, when describing the injury, Wade explained that if he saw Sughrue on the street, he would not notice any difference between his ears. *See Isaac v. State*, 167 S.W.3d 469, 475 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (explaining that "a defendant's testimony alone is sufficient to raise the issue" of whether lesser included-offense instruction should be given).

***6** In its brief, the State contends that the testimony offered by Wade was insufficient to raise the issue of the lesser included offense of assault or to negate the charged offense. Specifically, the State asserts that the testimony regarding the severity of the wound was a lay opinion, that a defendant may not provide an opinion regarding the severity of an injury that he allegedly caused, and that Wade was not qualified to provide an expert opinion about the seriousness of the wound.

The State also argues that Wade's assessment of the injury as being something that he would not notice if he observed Sughrue and did not know him could not have entitled Wade to the lesser included offense instruction because the hypothetical is flawed. More precisely, the State notes that Wade knew Sughrue and knew that Sughrue had sustained the injury at issue.

We have not been pointed to any case law supporting the proposition that a defendant may not provide testimony regarding the severity of an injury or that a jury may not consider that testimony as evidence. Courts have determined that victims are qualified to express an opinion regarding the seriousness of their injury, *see Jackson*, 399 S.W.3d at 292, and we are not persuaded that an alleged offender cannot provide similar testimony regarding an injury that he observes and admits that he directly caused by the use of his teeth. Similarly, we have been unable to find support for the proposition that testimony from a witness—the defendant or otherwise—that an injury is not a serious bodily injury cannot qualify as evidence sufficient to raise the need for a lesser offense instruction even though the witness is not a doctor or other qualified expert. *Cf. id.* (stating that " '[s]erious bodily injury' may be established without a physician's testimony when the injury and its effects are obvious"). Moreover, we do not read Wade's testimony as narrowly as the State does and instead read the testimony as an expression regarding the visibility of the injury rather than a hypothetical expression of what his observations might be if he did not know Sughrue.

The State also argues that Wade's statement indicating that he did not see a deformity at the time of trial is insufficient to necessitate an instruction on the lesser offense of assault because determinations regarding whether an injury is a serious bodily injury are made based on the evidence pertaining to the injury when the injury is inflicted and not after medical treatments have ameliorated the effects of the injury. *See Stuhler*, 218 S.W.3d at 714. Although the State is correct that the assessment of the severity of an injury is based on the injury as it was inflicted, this case did not involve a circumstance in which significant medical procedures were undertaken to restore the aesthetic appearance of the ear; on the contrary, the testimony presented at trial demonstrated that the earlobe was not reattached and that the wound was closed by the use of stitches. Under the circumstances of this case, Wade's description of the current state of the injury would seem to have provided a basis upon which a jury could infer that the injury was not a severe and permanent disfigurement when it was inflicted. Even assuming that Wade's current description could not necessitate the inclusion of a lesser offense instruction, Wade also testified that Sughrue did not sustain a serious bodily injury in the assault, which provided more than a scintilla of evidence that Sughrue did not suffer a serious permanent disfigurement. [3]

***7** For these reasons, we conclude that more than a scintilla of evidence was presented during trial that negated the greater offense of aggravated assault by causing serious bodily injury and raised the lesser offense of assault by causing bodily injury and that the district court erred by denying Wade's request for a lesser included offense instruction for assault. *Cf. Bullock*, 509 S.W.3d at 929-30 (determining that trial court erred by failing to include instruction on lesser included offense of attempted theft where jury could have determined that defendant was not guilty of theft of truck but was guilty of attempted theft by believing evidence that defendant was inside truck without consent with intent to steal it and by believing defendant's testimony stating that his feet were not on the pedals, that he did not turn truck on, and that he did not attempt to move truck); *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998) (explaining that trier of fact is "free to selectively believe all or part of the testimony proffered and introduced by either side" and that lesser included offense of assault in robbery case should have been included where defendant denied that he committed theft); *Hardeman v. State*, 556 S.W.3d 916, 922-23 (Tex. App.—Eastland 2018, pet. ref'd) (deciding that lesser included offense instruction for assault should have been given in case alleging assault family violence by occlusion where there was evidence that defendant did not impede victim's breathing or circulation); *Isaac*, 167 S.W.3d at 472, 475 (concluding that trial court erred by failing to give lesser included offense instruction for deadly conduct in trial for aggravated assault where defendant did not deny going to shop with gun but did testify that he only intended to scare his family, that he held gun at his side and never pointed it at anyone, that gun went off when he was tackled by his stepbrother, and that he did not intend to hurt anyone but himself).

[22] **[23]** **[24]** **[25]** If an appellate court determines that there is error present in a jury charge, it must then evaluate the harm caused by the error. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). The amount of harm needed for a reversal depends on whether a complaint regarding "that error was preserved in the trial court." *Swearingen v. State*, 270 S.W.3d 804, 808 (Tex. App.—Austin 2008, pet. ref'd). If the defendant made a timely objection, as in this case, reversal is required if there has been "*some* harm." *Almanza v. State*,

686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). "In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless." *Id.*

[26] **[27]** In this type of analysis, reviewing courts "consider: (1) the jury charge as a whole, (2) the arguments of counsel, (3) the entirety of the evidence, and (4) other relevant factors present in the record." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). Although the standard is less stringent than the analysis performed when an objection is not made, the reviewing court must still "find that the defendant 'suffered some actual, rather than merely theoretical, harm from the error.' " *Id.* (quoting *Warner v. State*, 245 S.W.3d 458, 463 (Tex. Crim. App. 2008)).

[28] Although the abstract portion of the jury charge included an instruction on simple assault as well as aggravated assault and defined the terms "bodily injury" and "serious bodily injury," the application paragraph, as set out above, did not contain any instructions authorizing the jury to find Wade guilty of assault as opposed to aggravated assault. Courts have "routinely found" in circumstances where "a lesser included offense [instruction] ... was requested and raised by the evidence" and where the failure to include that instruction "left the jury with the sole option either to convict the defendant of the greater offense or to acquit him" that " 'some' harm" occurs from the failure to include the instruction. *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995); *see also Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005) (explaining that "the harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer"); *Ramirez*, 263 S.W.3d at 43 (finding "some harm" where "the absence of the lesser included offense instruction left the jury with the sole option either to convict the defendant of the charged offense or to acquit him").

In its brief, the State contends that any error in the jury charge was harmless. As support, the State notes that the jury charge contained instructions on the "Special Issue" of whether Wade used a deadly weapon during the assault. Specifically, the instruction directed the jury to consider the issue if it found Wade guilty of aggravated assault causing serious bodily injury; included definitions for the terms " '[d]eadly weapon,' " " '[b]odily injury,' " and " '[s]erious bodily injury' "; and asked the jury to specify whether it found beyond a reasonable doubt that he "used or exhibited a deadly weapon, namely, the defendant's teeth, during the commission of the felony offense of Aggravated Assault Causing Bodily Injury." In light of the special-issue instructions, the State argues that the jury was free to find that he did not use a deadly weapon during the offense "and thereby inject an inference that they were harboring residual reasonable doubt" but instead chose to make the finding.

***8** However, the special-issue definitions for serious bodily injury and bodily injury were the same as those included in the abstract portion of the jury charge. Moreover, the special-issue definition for " '[d]eadly weapon' " specified that a deadly weapon is "anything that in the manner of its use is capable of causing death or serious bodily injury," and the special-issue instruction directed the jury to make a deadly-weapon finding if it found that Wade "used or exhibited a deadly weapon" during the offense. In light of the fact that the same definition for "serious bodily injury" formed the basis for the conviction and for the deadly-weapon finding, we do not agree with the State's argument that the deadly-weapon finding made by the jury in this case shows that there was no harm from the failure to provide the lesser included instruction. In fact, during its closing argument, the State told the jury twice that if it found Wade guilty of the charged offense, the deadly-weapon issue was "necessarily" true. Accordingly, we conclude that the first factor weighs in favor of some harm.

[29] Turning to the arguments of counsel, we note that during the State's opening argument, it asserted that Sughrue now has a "permanent disfigurement ... because [Wade] bit" off part of his ear, but the State did not assert that the injury was a serious permanent disfigurement. During the first portion of its closing argument, the State again characterized the injury as a permanent disfigurement but asserted during the second portion that the injury was a serious permanent disfigurement. In his closing argument, Wade emphasized that the State's characterizations of the injury omitted the term "serious," that the injury had to be a "serious" one to qualify as serious bodily injury, that none of the witnesses at trial described the injury as a "serious permanent disfigurement," that Sughrue did not use the word serious to describe his own injury, and that none of the treating physicians were called to the stand and, accordingly, did not provide any expert testimony regarding the severity of the injury. In light of the preceding, we conclude that the second factor also weighs in favor of a finding of some harm.

[30] Regarding the evidence presented at trial, we note that although the evidence was legally sufficient to support an inference that the injury qualified as serious permanent disfigurement, the severity of the injury was one of the primary contested issues. Additionally, as Wade correctly points out, no witnesses, including Sughrue, used the word "serious" when describing the injury, and he testified that the injury was not serious and that he would not notice any difference between Sughrue's ears if he did not know of the injury. Accordingly, we believe that, on balance, the third factor either weighed in favor of some harm or was neutral regarding whether Wade suffered some harm.

[31] Turning to the fourth factor, we note that although Wade was ultimately placed on community supervision when he was sentenced, the jury assessed his punishment at five years' imprisonment. That sentence is longer than the maximum sentence allowed for simple assault, *see* Tex. Penal Code § 22.01(b), which is, generally speaking, "confinement in jail for a term not to exceed one year," *see id.* § 12.21. Accordingly, we believe that this factor also weighs in favor of a finding of some harm. *See Hardeman*, 556 S.W.3d at 924 (determining that defendant suffered some harm after noting that sentence assessed exceeded "maximum punishment" available for lesser included offense).

In light of our resolution of the factors set out above, we conclude that Wade suffered some harm from the denial of his request for a jury instruction. Therefore, having found error and some harm from that error, we sustain Wade's second issue on appeal. *See id.* (concluding that defendant suffered some harm from denial of instruction "on the lesser included offense of simple assault").

CONCLUSION

***9** Having overruled Wade's first issue but having sustained his second issue, we reverse the district court's judgment of conviction and remand the cause for a new trial.

All Citations

--- S.W.3d ----, 2020 WL 253345

Footnotes

1 The indictment also alleged that Wade committed the offense of burglary of a habitation. *See* Tex. Penal Code § 30.02. However, the State later abandoned that charge.

2 In his reply brief, Wade contends that *Sizemore* is factually distinguishable from the current case because the victim in *Sizemore* required more extensive hospitalization than Sughrue did and because the injury would "require a two-to-three stage reconstruction." *See Sizemore v. State*, 387 S.W.3d 824, 829, 830 (Tex. App.—Amarillo 2012, pet. ref'd). Although we agree with Wade that there are differences between this case and *Sizemore*, we believe that the analysis is still helpful to explaining how a jury could reasonably infer serious bodily injury to an ear based on the evidence presented at trial.

3 On appeal, the State also points out that aggravated assault can be established by evidence that an individual committed assault causing serious bodily injury *or* used or exhibited a deadly weapon during the commission of an assault. *See* Tex. Penal Code § 22.02(a). Building on this proposition, the State highlights that the jury made an affirmative finding on the special issue of whether Wade used a deadly weapon during the assault and, therefore, argues that Wade was not entitled to a lesser-included charge under the second element of the test because the evidence failed to "refute[ ] or negate[ ] every theory which elevates the offense from the lesser to the greater." *See Ritcherson v. State*, 568 S.W.3d 667, 671 (Tex. Crim. App. 2018) (quoting *Arevalo v. State*, 970 S.W.2d 547, 549 (Tex. Crim. App. 1998)). However, although the indictment provided a deadly-weapon notice and although the jury charge included the special instruction pertaining to Wade's use of a deadly weapon, neither the indictment nor the application portion of the jury charge provided alternative theories for convicting Wade of aggravated assault and instead only addressed aggravated assault by causing serious bodily injury. *Cf. Thomas v. State*, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014) (explaining that if statute contains alternative manners in which offense may be committed but if State chooses "to plead only one," "the State is required to prove that the defendant committed the alleged crime using that specific statutory manner and means" and "may not rely on any other statutory manner and means of committing the crime it did not plead in the charging instrument"); *Sanchez v. State*, 376 S.W.3d 767, 773 (Tex. Crim. App. 2012) (stating that "[a]s a general rule, the instructions must also conform to allegations in the indictment"). Accordingly, we do not agree with the State's suggestion that the evidence was required to refute or negate both alternatives listed in the Penal Code for Wade to be entitled to the requested instruction.

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